

NO. 82-1087

Supreme Court, U.S.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE INTERNATIONAL BROTHERHOOD OF BOILER-  
MAKERS, IRON SHIP BUILDERS, BLACKSMITHS,  
FORGERS AND HELPERS, LOCAL #1509,

Petitioners,

v.

WILLIAM WATTLETON, et al.

and

STEVE T. TILLMAN, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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## STATEMENT

A. Prior Proceedings - This action was filed December 29, 1975 pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and 42 U.S.C. §1981 (and pursuant to other statutes not now pertinent). Respondents herein (hereafter "plaintiffs"), a group of blacks hired by Ladish Co. prior to 1968, sued Ladish and seven labor unions including petitioner herein (hereafter "Blacksmiths"). Plaintiffs alleged a class action and attacked, inter alia, the seniority systems maintained by the defendants in the pertinent collective bargaining agreements, contending the seniority systems intentionally perpetuated into the present past historical discriminatory hiring, assignment and transfer practices.

The District Court granted class certification (A. 14, 23). <sup>1/</sup> Thereafter, after additional discovery and notice to the class, the District Court approved a Consent Decree settling plaintiffs' claims against Ladish and four of the union defendants (A. 25). The Consent Decree (A. 43) <sup>2/</sup> provided, inter alia, for monetary payments to class members and allowed class members who so desired to transfer from jobs

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1/ The reference "A. \_\_\_\_" followed by the pertinent page(s) is to the Appendix filed by petitioner with its petition. While "Pet. \_\_\_\_" followed by the pertinent page(s) refers to the instant petition.

2/ The Consent Decree printed in the Appendix is not the decree entered by the Court. The decree printed in the Appendix states that the Machinists (see fn. 3 infra) joined in the decree; however, the Machinists were not a party to it.

within the jurisdiction of the union <sup>3/</sup>  
where they had initially been assigned  
to jobs within the jurisdiction of the  
other unions representing employees at  
Ladish with full carryover seniority for  
all purposes including competitive  
bidding.

Three of the union defendants,  
including the Blacksmiths, had the  
opportunity to join in the Consent  
Decree but did not. None of the non-  
settling defendants objected to entry  
of the Consent Decree. The Consent  
Decree specifically reserved to plain-  
tiffs the right to proceed to trial

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3/ All plaintiffs and class members  
had initially been assigned to jobs  
within the jurisdiction of defendant  
International Association of Machinists  
and Aerospace Workers, Local No. 1862  
(hereafter the "Machinists").

against the non-settling defendants (A. 44).

The failure of the non-settling defendants to agree to the Consent Decree effectively negated a portion of the seniority relief ordered in the Decree. Specifically, class members who desired to transfer with full carryover seniority into jobs within the jurisdiction of the non-settling union defendants, including the Blacksmiths, were prevented from doing so because those unions were not party to the Consent Decree.

In March 1981, plaintiffs proceeded to trial against the non-settling defendants, including the Blacksmiths. Thereafter, the District Court entered Findings of Fact and Conclusions of Law (A. 63) and a Judgment (A. 117) finding

that the Blacksmiths had taken actions intentionally designed to discriminate against blacks; that the seniority system negotiated by Ladish and the Blacksmiths had been negotiated and maintained with the intent and effect of discriminating against blacks; and that the Ladish-Blacksmiths' seniority system was not a bona fide one.

The Judgment, in pertinent part, imposed upon the Blacksmiths the seniority relief ordered in the Consent Decree (A. 119) and provided plaintiffs an opportunity to obtain additional monetary compensation in proceedings to be held before a special master (A. 120). The Judgment was stayed pending appeal. The Blacksmiths appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the lower



court (A. 1). The Circuit Court subsequently denied the Blacksmiths' petition for rehearing (A. 125).

B. Pertinent Facts - Plaintiffs are blacks who were hired by Ladish prior to January 22, 1968 directly into jobs within the jurisdiction of the Machinists. At all relevant times, plaintiffs have been unable to move from their Machinists unit jobs to jobs within the jurisdiction of other unions at Ladish, including the Blacksmiths, without forfeiting accrued seniority rights for competitive purposes such as layoff, recall and job bidding.

Ladish is a major employer in the Milwaukee area. The Blacksmiths, the second largest union at Ladish, represent approximately 1,000 of the 4,000 bargaining unit employees.

Between 1948 and 1968, Ladish hired 190 blacks who were still actively employed in 1974 when the Company analyzed its work force in response to an audit by the Office of Federal Contract Compliance. All of these blacks had been initially placed into jobs within the jurisdiction of the Machinists. During the years 1948 to 1968 (and only considering employees who were actively employed in 1974) Ladish had hired and placed 375 nonblack employees into jobs under the jurisdiction of the Blacksmiths as well as over 400 nonblack employees into jobs within the jurisdiction of the other unions at Ladish (A. 113-116). During this twenty year period no blacks were hired, assigned or transferred into Blacksmiths unit jobs (A. 71). Employees once assigned to a

job within the jurisdiction of one union at Ladish have, at all times material (with the single exception discussed below), faced the loss of competitive seniority if they transferred to a job within the jurisdiction of another union. An employee who would transfer from a job in the Machinists unit to a job within the jurisdiction of the Blacksmiths, for example, would exercise competitive seniority (layoff, recall and job bidding) within the Blacksmiths unit as of the date of transfer only (A. 82). The seniority system thus discouraged transfer of any employee who had been with the Company for a significant period of time because the resultant seniority loss would subject a transferring employee to possible layoff or force him to accept the least desir-

able jobs in his new unit. While Ladish maintained a stated policy of allowing inter-bargaining unit transfers the District Court found that several plaintiffs had been met with discouragement and outright harassment when they attempted to transfer to jobs within the Blacksmiths unit (A. 87).

Ladish and the Blacksmiths entered into their first collective bargaining agreement in 1945. Employees in 1945 who transferred from a job within the jurisdiction of another bargaining unit to a job within the jurisdiction of the Blacksmiths unit forfeited their competitive seniority for purposes of lay-off, recall and job bidding. The original contract contained a nondiscrimination clause (Article I, ¶4) which read as follows:

Neither the Company nor the Union shall discriminate against any employee because of his membership or non-membership in the union, or his race, color, creed, or national origin (A. 94).

However, beginning with the Ladish-Blacksmiths agreement effective August 22, 1949 to September 30, 1951 which was negotiated after the first blacks were hired at Ladish (in 1948), the Blacksmiths negotiated several contract changes which adversely affected black employees. First, the nondiscrimination clause which had been included in the original Ladish-Blacksmiths agreement and maintained in two subsequent agreements was eliminated. Second, the competitive seniority rights of employees transferring into the Blacksmiths bargaining unit from other units were changed so that if an employee transferred from a job within the jurisdic-

tion of another bargaining unit to a job within the jurisdiction of the Blacksmiths, he was allowed to carry with him his accrued plantwide seniority for purposes of layoff and recall (A. 96). Finally, the 1949-1951 agreement contained a new provision (Article IV, Transfers and Layoffs, ¶8) regarding inter-bargaining unit transfers (A. 95) which read as follows:

Permanent inter-bargaining unit transfers will be made by agreement between Management and the Bargaining Committee of the unit to which the employee is being transferred.

At various times from August 1949 to January 27, 1955, a number of nonblack employees transferred from jobs within the jurisdiction of other bargaining units to jobs within the jurisdiction of the Blacksmiths

(A. 96). All of the transferring employees were able to utilize their carryover seniority for layoff and recall purposes in the Blacksmiths unit. During this same 1949-1955 period, no blacks were allowed to transfer.

In the Ladish-Blacksmiths collective bargaining agreement effective September 20, 1954 to September 24, 1956, the provision allowing carryover plantwide seniority for the purpose of layoff and recall for those transferring into the Blacksmiths unit was deleted; however, the Company and the Blacksmiths have continued to the present to allow the nonblack employees who transferred into jobs within the Blacksmiths jurisdiction between 1949 and 1955 to retain and utilize their carryover seniority for layoff and recall purposes.

The nondiscrimination clause which had been contained in original Ladish-Blacksmith contract and which was deleted in 1949 was not returned to the pertinent collective bargaining agreement until after the passage of Title VII in 1964. The provision concerning inter-bargaining unit transfers into Blacksmiths unit jobs which required agreement with respect to such transfers by both management and the bargaining committee of the Blacksmiths was retained in the Ladish-Blacksmiths collective bargaining agreement at least until 1966.

Two witnesses with expertise concerning the history of seniority systems in the Milwaukee area and throughout the United States testified that they were unaware of any collective bargaining



agreements where a multi-unit seniority system had, at one time, allowed carry-over of full plantwide seniority for employees transferring from one unit to another for purposes of layoff and recall and then been changed to prohibit the carryover of such seniority for said purposes (A. 97). The Court below found (A. 98):

74. These changes in the Ladish-Blacksmiths' collective bargaining agreement, when considered in light of the evidence heard by the Court relating to individual blacksmith's feelings toward transfer of the plaintiffs into jobs under the jurisdiction of the Blacksmiths and the evidence showing that nonblacks were allowed to transfer with full carryover seniority to jobs under the jurisdiction of the Blacksmiths while during the same time period blacks were discouraged from doing so, are persuasive evidence that the Blacksmiths' seniority system has not been negotiated and main-

tained free from any illegal purpose. The Court specifically finds that the plaintiffs have come forward with sufficient credible evidence to support their claim that the challenged seniority system contained in the Ladish-Blacksmiths' collective bargaining agreement, inter alia, was negotiated and maintained with a purpose of preventing only blacks from entering into jobs under the jurisdiction of the Blacksmiths.

#### REASONS TO DENY THE WRIT

The decision below is correct and is consistent with the rulings of this Court. Petitioner does not attack any specific findings of fact, and the findings, including those of intentional discrimination, are not clearly erroneous. Petitioner did not request contribution or idemnification in its responsive pleadings nor was the issue raised in the district or circuit courts. Contribution is neither proper

under the facts of this case nor required by previous decisions of this Court. Further review of this case is thus unwarranted.

I. The Pertinent Seniority System was Properly Found to have Violated Title VII. The Blacksmiths contend that the District Court, as affirmed by the Court of Appeals, was in error in concluding that the Blacksmiths-Ladish seniority system was negotiated and maintained with the intent to discriminate against blacks. In the Petition, however, the Blacksmiths do not identify any specific facts found by the District Court or inferences drawn therefrom which the Blacksmiths contend are incorrect. Petitioner even admits that the pertinent changes in the collective bargaining agreements "supported

the court's inference that the Blacksmiths were attempting to keep blacks out of their bargaining unit" (Pet. 28). Petitioner further admits that it is the role of the District Court to make findings on the issue of intent using all the evidence and reasonable inferences drawn therefrom (Pet. 28). See, Pullman-Standard v. Swint, \_\_\_\_ U.S. \_\_\_\_ (1982); Village of Arlington Heights v. Metro. Housing Div., 429 U.S. 252, 266 (1977).

The writ should not be granted because the relevant facts are unique to this case and because the pertinent findings and legal conclusions are correct. The existence of historical discrimination in hiring, transfer and assignment is conceded. The fact that the pertinent seniority system "locked in" the effects of this historical

discrimination by requiring plaintiffs to forfeit competitive seniority if they transferred to the previously all-white jobs is also admitted. Prior to this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), no further proof would be required for plaintiffs to prevail.

After Teamsters, however, the District Court was required to scrutinize the history of the pertinent seniority system to determine if the system was bona fide and thus protected by Section 703(h) of Title VII. The trial court was faithful to Teamsters and its lower court progeny. It analyzed the "totality of the circumstances" and found purposeful discrimination by the Blacksmiths in the maintenance and negotiation of the

pertinent system. See, Teamsters, supra at 352-356; James v. Stockham Valves & Fittings Co. 559 F.2d 310, 352 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1978). The Seventh Circuit, faithful to Swint (A. 9-12), affirmed the District Court's findings and legal analysis.

The trial court, realizing that a finding of intentional racial discrimination required a "sensitive inquiry" (A. 87), weighed the evidence discussed above and other relevant evidence and concluded the seniority system was infected with discrimination and thus was not bona fide. In performing its duty, the District Court, contrary to petitioner's assertion, acted in complete accord with this Court's decision in Teamsters. The Teamsters inquiry was carefully conducted and as Swint makes

clear, the findings, including those of intent, can only be reversed if clearly erroneous, a standard which petitioner has neither alleged nor met.

II. The Blacksmiths are not Entitled to Contribution or Indemnification. Plaintiffs settled their claims against defendant Ladish and several of the union defendants in a Consent Decree. The Blacksmiths, who refused to join the decree and thereby delayed the opportunity for plaintiffs to obtain substantial seniority relief, now seek, in the face of authority they admit is "consistent(ly)" against them (Pet. 33), protection from the consequences of their tactical decision.

Plaintiffs contend that the Blacksmiths are precluded from raising the contribution issue in this Court because

it has never before been raised in this litigation. The Blacksmiths, in their responsive pleadings, neither sought contribution or indemnification from any of the other defendants nor filed any crossclaims against Ladish. Petitioner did not object to the Consent Decree in anyway, and the contribution issue was not raised in any form at trial or on appeal until the instant petition was filed.

The Blacksmiths have not provided any reason why this Court should deviate from the normal rule that it will not consider issues neither raised before or considered by the Court of Appeals. Addickes v. Kress & Co., 398 U.S. 144, 147, n.2 (1970) and cases cited therein. Indeed, to allow the issue to be considered for the first time in this Court would upset the expectations of those



parties who agreed to the Consent Decree.

Nevertheless, even assuming that this issue is properly before this Court, the issue was settled in Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981). The Northwest Airlines case held that Title VII specifically did not allow for contribution in a case brought by an employer against a union seeking contribution under a joint collective bargaining agreement. The Blacksmiths now attempt to distinguish Northwest Airlines and contend unions should be entitled to contribution because Title VII "was expressly directed against employers" (Pet. 42-43). The Blacksmiths are simply wrong in their assertion that Title VII was not designed to prevent discrimination caused by labor unions.

The statute specifically prohibits unions, as well as employers, from engaging in intentional discrimination. There is nothing in the Northwest Airlines decision or the petition which provides a rationale for allowing unions contribution denied to employers. Contrary to the Blacksmiths' assertions, this case is unlike duty of fair representation cases. In those cases, two distinct elements, an employers' wrongful conduct and a union's failure to represent its member, are typically involved. Here, the Ladish-Blacksmiths collective bargaining agreements are the products of the joint efforts of both the employer and union and each party is responsible for its intentional acts of discrimination.

Petitioner's assertion that Ladish has a right to contribution (Pet. 46) is

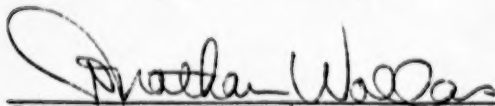
wrong. Ladish's payments under the Consent Decree will not be reduced if additional payments are received by the Blacksmiths.

Finally, the Blacksmiths' contention that they were denied a fair trial because Ladish settled with the plaintiffs is frivolous. Petitioner has never raised this claim in any court prior to this one, and Ladish officials were deposed, testified at trial and were examined by the Blacksmiths.

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,



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